

Millionaire Tax

Massachusetts Court Hears Arguments in Millionaire's Tax Case

BNA Snapshot

- Justices focused on whether initiative's tax, spending provisions are related
- Considering potential ballot question on 4 percent surtax on incomes over \$1 million
- Five business groups filed lawsuit, seeking to block initiative from November ballot



By Aaron Nicodemus

The Massachusetts Supreme Judicial Court will soon determine whether a millionaire's tax initiative is permitted on the November ballot.

Six justices heard oral arguments Feb. 6 over the proposed constitutional amendment, which would add a 4 percent surcharge on the state's personal income tax rate for incomes over \$1 million.

The initiative has twice been approved by the Legislature and was certified for the state ballot by Massachusetts Attorney General Maura Healey (D). The amendment is being pushed by Raise Up Massachusetts, a coalition of labor, faith, and community groups.

However, representatives of five groups have alleged that the proposed amendment violates Article 48 of the state's constitution in three ways:

- pairing an unpopular provision (the graduated income tax) with two popular ones (funding for education and transportation), which violates the constitution's ban on combining two or more unrelated items—a practice known as “logrolling”;
- improperly earmarking funding for education and transportation; and
- creating a tax.

David Nagle, a Boston-based partner at Sullivan & Worcester LLP who attended the hearing, said it was hard to tell from the justices' questions what they might decide.

“They are grappling whether this initiative is in fact an appropriation,” he said. While the Attorney General has argued there are ample choices within the two broad categories for legislators to decide how to spend the revenue, opponents say the initiative ties the hands of legislators.

“It's that segregation of the assets that is problematic,” he said.

Relatedness Questions

The justices questioned whether levying a graduated income tax is related to generating revenue for education and transportation—and further asked how education and transportation are related to each other.

"Somebody could be in favor of education spending, but not transportation," Justice Scott L. Kafker said. "Or they could be in favor of transportation, but not a graduated income tax."

However, Chief Justice Ralph D. Gants said that the initiative "doesn't tie the Legislature's hands," because the initiative only generates tax revenue, estimated to be about \$2 billion per year. The Legislature still has control over how the money is spent, he said.

Legislature v. Voters

Meanwhile, plaintiff attorney Kevin Martin, a Boston-based partner with Goodwin Procter LLP, reiterated the "logrolling" argument that the initiative attempts to couple the two popular funding provisions with the unpopular graduated tax provision. Martin further argued that the question of whether to set a graduated income tax and whether to spend tax revenue on transportation or on education are three separate public policy questions.

Assistant Attorney General Juliana deHaan Rice disagreed, saying the ballot question proposes "a broadly based tax initiative that will make more resources available from the income tax."

Justice David Lowy questioned whether the initiative is "setting a tax and picking two important areas of spending?"

"Isn't that what the Legislature does?" Lowy asked.

In response, Rice said that this court has held that voters get to make that decision "within a range and array of choices." She said that the ultimate decision of how the money is allocated is still in the Legislature's hands.

"In this provision, everything moves in the same direction," Rice added.

Voicing Opposition

After the hearing, the Associated Industries of Massachusetts reiterated its opposition to the initiative on its blog.

"AIM opposes the graduate-tax proposal on a policy basis because it would harm thousands of small and medium-sized business that pay taxes on an individual basis," the post said. "The Massachusetts Department of Revenue estimates that 80 percent of the returns that would be affected by the surtax include some amount of business income."

Associated Industries of Massachusetts is one of the five groups that filed the October 2017 complaint—the other groups are Representatives for Massachusetts High Technology Council, the Massachusetts Taxpayers Foundation, the National Federation of Independent Businesses, and the Massachusetts Competitive Partnership.

The case is *Anderson v. Healey*, Mass., SJC-12422, oral argument 2/6/18.

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